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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

RONALD W. LATHEY,

Respondent,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a state worker's compensation law apply to an injury sustained during repair of a completed vessel on navigable waters within the state's territorial boundaries?

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STATEMENT OF THE CASE

The Statement of the case contained on pages 1-3 of the Petitioner's Petition for Writ of Certiorari is accurate.

ARGUMENT

Respondent, Ronald Lathey, the injured employee, respectfully urges this Honorable Court to deny the Petition for a Writ of Certiorari for the following reasons:

1. The line of decisions following *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), on which the petitioner rests its argument, has been narrowed by judicial recognition of a twilight zone in which a regime of concurrent jurisdiction may exist between state and federal worker's compensation laws.

2. This Court has allowed exceptions to the *Jensen* "limitation upon the power of states to interpose where maritime matters are involved" by approving state benefits to a worker injured while engaged in repair of a completed vessel on the navigable waters of the U.S. in *Bethlehem Steel Company v. Moore*, 335 U.S. 874 (1948) (affirming the Massachusetts Court) and in *Baskin v. Industrial Accident Commission*, 338 U.S. 854 (1949) (reversing the California court's denial of benefits), and 340 U.S. 886 (1950).

3. No new legal developments have occurred since this Court's affirmation of the twilight zone concept in *Davis v. Department of Labor and Industries*, 317 U.S. 249 (1942), *Calbeck v. Travelers Insurance Company*, 370 U.S. 114 (1962), and *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980).

I. The Constitution, as Interpreted by This Court, Allows a State Workers' Compensation Law to Apply to Injuries Sustained in the Repair of a Completed Vessel on Navigable Waters within the State's Territorial Boundaries.

As far back as 1942, this Court said: "There is, in light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons . . . who are, as a matter of actual administration, in fact protected under the state compensation act." *Davis v. Department of Labor and Industries* , 317 U.S. 249, 256 (1942).

Then in 1962, this Court stated, "[o]ur conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck v. Travelers Insurance Company*, 370 U.S. 114, 117 (1962)(footnote omitted).

In its most recent decision on concurrent jurisdiction, this Court said, "The language of the 1972 amendments [to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq* (1980)], cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA, and thereby resurrecting the jurisdictional monstrosity that existed before the clarifying opinions in Davis and Calbeck . . . if anything, that change reinforces our previous interpretation of that section as contemplating concurrent jurisdiction." *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 720-21 (1980).

Subsequent to the articulation of the twilight zone concept in *Davis*, this Court held that repair on a completed vessel was within that twilight zone in *Bethlehem Steel Company v. Moore*, 335 U.S. 874 (1948) (affirming the Massachusetts court's decision granting state benefits) and *Baskin v. Industrial Accident Commission*, 338 u.S. 854 (1949) (vacating and remanding the California court's denial of benefits for reconsideration in light of *Moore*), and 340 U.S. 886 (1950).

The Virginia Court of Appeals below found that the Respondent injured his shoulder while repairing a completed vessel on the Elizabeth River at a pier in Norfolk, Virginia. This finding

placed the employee inside the judicially established "twilight zone" within which "federal jurisdiction supplements rather that supplants, state compensation law". *Sun Ship, Inc.*, 447 U.S. at 720. Therefore, the state Court of Appeals below correctly affirmed an award of benefits under the Virginia Workers' Compensation Act, Va. Code §§ 65.1-1, *et seq* (1987), by the Industrial Commission of Virginia, the tribunal charged with adjudicating claims brought under the state act.

The Court of Appeals below acted appropriately and within precedent established by this Court. This Court should decline to review a settled question such as the instant matter in the absence of new developments or changed law.

A. THE NARROWING OF *JENSEN*

Relying on *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), the Petitioner contends that the Federal workers' compensation statute is the Respondent's exclusive remedy for injuries sustained on board a completed vessel on the navigable waters of the United States. This contention is based on the premise that states are barred by the United States Constitution from the application of state statutory schemes in maritime arenas. *Jensen* declared, however, that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied." *Jensen*, 244 U.S. at 216 (emphasis added).

Notwithstanding this qualifier, *Jensen* was construed to prohibit the grant of workers' compensation benefits to thousands of employees. *Calbeck, supra*, 370 U.S. at 118. Recognizing the "jurisdictional monstrosity" created by *Jensen*, this Court and Congress began to take immediate steps to rectify the matter. Just ten years after *Jensen*, Congress passed the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq* (1980). The language of the Act ensured compensation in cases of injury to employees on navigable waters to which *Jensen* and

others[1] had made the availability of a state compensation remedy questionable. *Calbeck*, 370 U.S. at 126.

Likewise, this Court has restricted, avoided and limited the application of *Jensen* ever since the decision was announced in 1917. The following cases are illuminating.

In *Western Fuel Company v. Garcia*, 257 U.S. 233 (1921), this Court concluded that the death of a stevedore at work in a hold of a vessel docked in San Francisco was not within the national uniformity requirement. The court upheld the jurisdiction of a Federal district court to entertain a suit in admiralty for damages for the death of the longshoreman under a state wrongful death statute. The Supreme Court reasoned that while the subject was maritime it was "local in character" and that application of the state statute would not work "material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 242.

In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), it was held that an employee of a shipbuilding company at work on a vessel which had been launched so as to be within admiralty jurisdiction could properly receive compensation under the Oregon State Compensation Law.

Millers' Indemnity Underwriters v. Braud, 270 U.S. 59 (1926), concluded that the Texas Workmen's Compensation Act could apply to a diver working for a shipbuilding company, where the diver was working from a floating barge anchored in the navigable waters of Texas. He was engaged in sawing off timbers of an abandoned set of ways formerly used for launching ships, which had become an obstruction to navigation. The Court held his employment to be maritime but local.

In *Alaska Packers Association v. Industrial Accident Commission*, 276 U.S. 467 (1928), an employee was injured trying to push a stranded boat into navigable waters. The boat was to be

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[1]*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) and *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924) declared unconstitutional two attempts by Congress to deal with the *Jensen* mischief by passing legislation allowing state compensation statutes to operate. This Court found that the legislation tended to defeat the purpose of the Constitution to achieve harmony and uniformity in maritime law.

floated to a nearby dock and then removed from the water. The employment was held maritime but local.

Sultan Railway and Timber Company v. Department of Labor and Industries, 277 U.S. 135 (1928) held that taking apart booms of logs which had been floated to a saw mill on navigable waters was maritime employment but local.

Thus, (although *Jensen* has not been specifically overruled), in order to avoid the application of the *Jensen* rule, this Court created the doctrine of "maritime but local" where state workers' compensation statutes may constitutionally apply.

However, as a result of the "maritime but local" doctrine, it was still very difficult to determine which workers were covered by State Acts and which were not. Commentators noted that "only a sooth-sayer with a crystal ball could tell which claimants were on the state side of the line ("maritime but local") and which were on the federal side ("maritime but national")." Gilmore and Black, *The Law of Admiralty* (2d Ed. 1975) at 419-420.

This Court offered some clarification in *Davis, supra*, 317 U.S. 249. *Davis* involved a structural steel worker who drowned when he fell into a river while engaged in dismantling a bridge over navigable waters. In *Davis*, this Court recognized the confusion created by *Jensen*: "The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here." *Id.* at 253. (footnote omitted).[2] In an effort to alleviate some of the confusion, this Court recognized the boundary between state and federal compensation schemes as a "twilight zone" in which there existed

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[2]The footnote omitted cites cases both in support of and against state jurisdiction and gives a reference to lists of other cases on both sides. The index of cases includes *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930), which held that repair of a completed ship lying in navigable waters has a direct and intimate connection to navigation and commerce. *Span* was not a landmark decision; its participating dissenters included Justices Holmes and Brandeis. Although *Span* is quoted in subsequent decisions, it is quoted most often for its ambiguity and for its contribution to the confusion surrounding the federal versus state compensation controversy. *Davis, supra*, 317 U.S. 249. *Moore's Case*, 323 Mass. 462, 80 N.E.2d 478, *aff'd*, 335 U.S. 874 (1948). Significantly, *Span* did not say that a connection between an employee's injury and navigation and commerce precluded a finding of jurisdiction under a state compensation scheme. *Span* clearly does not offer a definitive answer.

essentially concurrent jurisdiction between the two schemes. *Id.* at 256. Within this zone, employee rights are to be determined on a case by case basis. In allowing recovery in *Davis* under a state worker's compensation statute, this Court found surrounding circumstances to be controlling. *Id.* The Court added the following instructive language with respect to the resolution of these kinds of cases.

> "Faced with this factual problem we must give great-indeed, presumptive-weight to the conclusions of the appropriate Federal authorities and to the state statutes themselves. Where there has been a hearing by the Federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy . . . In the instant case we do not enjoy the benefit of Federal administrative findings and must therefore look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there we have relied heavily on the presumption of constitutionality in favor of the state statute." *Id.* at 256-257.

The result of *Davis* is that injured water front employees have the right to recover compensation under either the Longshore Act or the workers' compensation law of the state in which the injury occurs. *Hahn v. Ross Island Sand and Gravel Company*, 358 U.S. 272 (1959). In *Hahn*, an employee working on a barge in navigable waters within a state was found to be within the twilight zone.

In 1962, this Court reiterated its determination that some maritime injuries may be compensated under either state or federal law in *Calbeck*, *supra*, 370 U.S. 114. *Calbeck* made clear that even in circumstances where the federal compensation scheme was the appropriate remedy, a state compensation statute "could validly have been applied." *Id.* at 129.[3]

Sun Ship, *supra*, 447 U.S. 715, is this Court's most recent endorsement of the "twilight zone". There this Court declared "that the 1972 extension of federal jurisdiction [by the amendments to the Longshore Act] supplements rather than supplants, state compensation." *Id.* 447 U.S. at 720. Clearly, then, depending upon circumstances of individual incidents, either compensation scheme may properly apply.

B. THE IDENTICAL QUESTION RAISED HEREIN HAS BEEN PREVIOUSLY DECIDED BY THIS COURT

While the foregoing cases are educative in unfolding the evolution of pertinent case law, no one of those cases alone is completely dispositive of the question raised herein. However, two decisions made by this Court more than forty years ago directly addressed this identical question and thereby render review by this Court unnecessary.

In *Moore*, *supra*, 335 U.S. 874, this Court affirmed the Massachusetts Court's award of state compensation benefits to a shipyard rigger who was injured when he slipped aboard a vessel in a dry dock floating in a navigable river. Similarly, in *Baskin*, *supra*, 338 U.S. 858 and 340 U.S. 886, this Court vacated and remanded the California Court's denial of state workers' compensation benefits to a helper injured while carrying planks from one hold to another, where a skilled joiner was to make the planks a part of the ship in the course of repairs.

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[3]*Calbeck* explained *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953) in which an employee was killed while engaged in repair of a vessel physically located on land but on a marine railway (and thus within the LHWCA requirement in §3(a) of occurrence "upon . . . navigable waters") so that LHWCA applied; however, the Court stated that state compensation could also have applied.

In these decisions, this Court issued a clear directive that repair work on board a completed vessel upon the navigable waters of the United States is within the twilight zone identified in *Davis*, *Calbeck*, and *Sun Ship* and that state compensation may constitutionally be applied.

It is uncontroverted that at the time of his injury, the Respondent was engaged in repair work on a completed vessel upon the navigable waters of the United States. Accordingly, these facts bring the Respondent's claim within the holdings of *Moore* and *Baskin*. Thus, the Virginia Court of Appeals acted within its jurisdictional authority in hearing Respondent's claim under the state compensation scheme and no error was created thereby.

C. AFTER *MOORE* AND *BASKIN*

In 1980, this Court was still concerned with the "jurisdictional monstrosity" created by *Jensen* prior to the clarifying opinions in *Davis* and *Calbeck*. *Sun Ship*, *supra*, 447 U.S. 715. The Court analyzed at length the 1972 amendments to the LHWCA in terms of existing case law and legislative history; the Court could "find no sign in the 1972 amendments to the LHWCA that Congress wished to alter the accepted understanding that federal jurisdiction could exist with state compensation laws." *Id.* at 722. Additionally, the Court did not find in the legislative history any suggestion of a "congressional decision to exclude state laws from the terrain newly occupied by the post-1972 Longshoreman's Act." *Id.* at 721.

It is implicit in the Court's opinion in *Sun Ship* that state schemes may cover maritime injuries of local interest. Thus, even after the 1972 amendments, this Court continued to endorse the "maritime but local" concept within the "twilight zone" theory. *Sun Ship* is still good law.

Since *Moore* and *Baskin*, the specific question raised herein has not been addressed by this Court. Further, those decisions are not altered either by the 1972 amendments to the LHWCA or by *Sun Ship*. Where the Court contemplates supplemental rather than supplanting jurisdictions, as in the circumstances of the instant matter, no question of unconstitutional enlargement of state authority need be raised. Consequently, it is respectfully submitted that *Moore* and *Baskin* should be controlling.

Moreover, even if this Court disagrees with the clear precedents of *Moore* and *Baskin* that the respondent's injuries are within the twilight zone, the injury that is the subject of the question herein is one of local concern. The injury occurred on a river within the state; the Respondent is a local resident; the Petitioner is a local employer. Clearly, the Respondent's injury is "maritime but local". This Court has approved state jurisdiction in such circumstances. Therefore, the Virginia Court of Appeals decision, which is within constitutional parameters, need not be reviewed.

CONCLUSION

The decision of the Virginia Court of Appeals below is in accord with constitutional principles and with decisions of this Court regarding the grant of jurisdiction over injuries within the twilight zone between state and federal compensation schemes. Accordingly, there is no error in this record. This Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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